

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

AFSHIN ZARINEBAF, ZACHARY
CHERNIK, and JOAN MEYER, individually
and on behalf of a class of similarly situated
individuals,

Plaintiffs,

v.

CHAMPION PETFOODS USA INC. and
CHAMPION PETFOODS LP,

Defendants.

) Case No. 1:18-cv-06951

) Honorable Virginia M. Kendall

**DEFENDANTS CHAMPION PETFOODS USA INC. AND CHAMPION PETFOODS LP'S
CORRECTED* LOCAL RULE 56.1(a)(2) STATEMENT OF MATERIAL FACTS**

Pursuant to Local Rule 56.1(a)(2), Defendants Champion Petfoods USA Inc. and Champion Petfoods LP (collectively, “Champion”), respectfully set forth the following material facts about which they contend there exists no genuine issue of fact:

Background of Champion Petfoods:

1. In approximately 1979, Champion’s founder, Reinhard Muhlenfeld began producing dog food in a feed mill, and in approximately 1985 launched the ACANA brand, which was similar to traditional dry kibble pet food. Declaration of Chinedu Ogbonna, (“Ogbonna Dec.”) attached as “**Exhibit 1**,” at ¶ 7.

2. In approximately 2005, Champion developed its ORIJEN brand, which is based on a Biologically Appropriate nutritional philosophy, which unlike dog foods that rely on basic grains and/or other fillers and many synthetic nutritional supplements, uses animal-based proteins to

* This Statement of Material Facts was originally filed as ECF No. 121 and has been corrected to include functioning hyperlinks in compliance with the Honorable Virginia Kendall’s Case Procedures.

attempt to mirror how wolves or wilds dogs would get nutrition in nature (albeit within the limitations of dry kibble form). Ogbonna Dec. ¶ 7; Deposition of Peter Muhlenfeld dated December 4, 2018 (“Muhlenfeld Dep. Vol. 1”), attached as “**Exhibit 2**,” at 122:16-22; 136:17-147:19; Declaration of Jeff Johnston (“Johnston Dec.”), attached as “**Exhibit 3**,” at ¶ 6.

3. Subsequently, ACANA adopted this nutritional philosophy and modified its formulas accordingly. Muhlenfeld Dep. Vol. 1 at 136:17-23; Ogbonna Dec. at ¶ 7.

4. Champion sells a wide variety of dog food diets (*i.e.*, formulations) under its brand names ORIEN and ACANA. Ogbonna Dec. at ¶ 8.

5. In the United States, the ACANA brand is a family comprised of three sub-brands: Heritage, Regionals, and Singles. Ogbonna Dec. at ¶ 8.

6. Beginning in approximately 1990, Champion manufactured all of its dog food out of its NorthStar kitchen, in Morinville, Alberta, Canada. Declaration of Christopher Milam, (“Milam Dec.”), attached as “**Exhibit 4**,” at ¶ 8.

7. In approximately January 2016, Champion opened its new DogStar kitchen in Kentucky and throughout 2016 transitioned the manufacturing of nearly all of its dog food sold in the United States (except for Alaska) to come exclusively from its new DogStar kitchen, with the exception of the diet ORIEN Tundra. Milam Dec. at ¶ 9.

Plaintiffs’ Purchases of Champion Dog Food:

8. Plaintiff Zachary Chernik (“Chernik”) purchased both ORIEN and ACANA diets produced at NorthStar kitchen beginning in 2006. Chernik’s Response to Champion’s First Set of Interrogatories, attached as “**Exhibit 5**,” at Response to Interrogatory No. 2.

9. At some point in 2016, when Champion transitioned its dog food sold in the U.S. to its DogStar kitchen, Chernik purchased the following diets that remain at-issue in this action¹ from DogStar: ORIJEN Six Fish, ORIJEN Regional Red, ORIJEN Senior, ACANA Regionals Grasslands, ACANA Singles Lamb & Apple, ACANA Singles Pork & Squash, ACANA Heritage Free-Run Poultry, and ACANA Heritage Red Meat. Chernik's Response to Interrogatory No. 5.

10. Chernik discontinued purchasing Champion dog food at the end of June 2017. Chernik's Response to Interrogatory No. 6; Deposition of Plaintiff Zachary Chernik, ("Chernik Dep."), attached as "**Exhibit 6**," at 63:4-25.

11. Plaintiff Afshin Zarinebaf ("Zarinebaf") fed his two dogs ORIJEN and ACANA diets from July 2013 through approximately September 2018. Zarinebaf's Response to Champion's First Set of Interrogatories, attached as "**Exhibit 7**," at Response to Interrogatory No. 4; Deposition of Plaintiff Afshin Zarinebaf ("Zarinebaf Dep."), attached as "**Exhibit 8**," at 46:22-47:6.

12. Zarinebaf's dogs consumed ORIJEN and ACANA diets produced at NorthStar kitchen prior to 2016, and consumed the following Champion dog food diets that remain at-issue in this action² produced at DogStar kitchen at some point in time between 2016 and September 2018: ORIJEN Six Fish, ORIJEN Regional Red, ACANA Singles Lamb & Apple, ACANA Singles Pork & Squash, and ACANA Regionals Grasslands. Zarinebaf Dep. at Ex. 3; Zarinebaf's Response to Interrogatory No. 5.

13. Plaintiff Joan Meyer ("Meyer") claims she began purchasing Champion dog food in 2004, but that it may have been a few years later. Meyer's Response to Champion's First Set of

¹ Chernik's purchases of all NorthStar diets and DogStar ACANA Duck & Pear and ACANA Wild Atlantic, as alleged in the Third Amended Complaint ("TAC," [ECF No. 68](#)) ¶ 7, have been dropped. See [ECF No. 102](#); [ECF No. 95](#) at 15-16.

² Zarinebaf's purchases of all NorthStar diets have been dropped. See [ECF No. 102](#); [ECF No. 95](#) at 15-16.

Interrogatories, attached as “**Exhibit 9**,” at Response to Interrogatory No. 4; Deposition of Plaintiff Joan Meyer (“Meyer Dep.”), attached as “**Exhibit 10**,” at 30:25-31:19.

14. Meyer began purchasing ORIJEN and ACANA produced at NorthStar kitchen and discontinued purchasing Champion dog food on or around June 2019, when it was produced at DogStar kitchen. Meyer’s Response to Interrogatory No. 8; Meyer Dep. at 51:12-15.

15. Meyer purchased the following at-issue³ Champion dog food diets from DogStar kitchen between 2016 until June 2019: ORIJEN Original, ACANA Singles Lamb & Apple, ACANA Singles Wild Mackerel, ACANA Heritage Red Meat, and ACANA Regionals Meadowland. Meyer’s Response to Interrogatory No. 12; Meyer Dep. at Ex. 3.

16. Meyer testified that she did not read the labeling for any ORIJEN or ACANA diet she purchased from DogStar. Meyer Dep. at 89:8-14, 89:21-90:1; 90:5-8, 90:20-23; 91:5-10; 91:17-21; 92:6-23; 98:8-24.

17. There is no evidence that any of the three Plaintiffs’ dogs’ illnesses or deaths were caused by the consumption of Champion dog food. Expert Report of Dr. Robert H. Poppenga (“Poppenga Report”), attached as “**Exhibit 11**,” at 39-40.

“Biologically Appropriate” Statements on Champion’s Packaging Purchased by Plaintiffs:

18. During all relevant times, the front of the packaging for the diets Plaintiffs purchased stated the diet was “Biologically Appropriate Dog Food.” Ogbonna Dec. ¶ 10; Plaintiff’s Motion for Class Certification [[ECF No. 95](#)] (“Class Cert Mot.”) at Ex. 1-11.

19. In its simplest form, Champion sometimes explains “Biologically Appropriate” as “Protein Rich, Carbohydrate Limited,” (*see, e.g.* [Class Cert Mot. Ex. 1 at 2](#), ’16-17 ACANA Heritage Free-Run Poultry; *id.* [Ex. 8 at 2](#), ’16-17 ORIJEN Six Fish), while at other times describes

³ Meyer’s purchases of all NorthStar diets and DogStar ACANA Duck & Pear, as alleged in [TAC](#) ¶ 9b, have been dropped. *See* [ECF No. 102](#); [ECF No. 95](#) at 15-16.

it as “Evolutionary Diet. Protein Rich.” *See, e.g., id. Ex. 1 at 3*, ’18 ACANA Heritage Free-Run Poultry; *id. Ex. 5 at 3*, ’18 ACANA Singles Pork & Squash.



20. The backs of Champion bags explain the origin of “Biologically Appropriate” philosophy in a variety of ways, sometimes stating, “All dogs evolved as carnivores – biologically adapted to a diet rich in meat and protein,” (*see, e.g., Class Cert Mot. Ex. 7 at 2*, ’16-17 ACANA Singles Wild Mackerel), or “your dog is a carnivore, designed by nature to thrive on whole game, fowl or fish, and possessing a biological need for foods that are rich and varied in fresh whole animal ingredients.” *See, e.g., Class Cert Mot. Ex. 1 at 2*, ’16-17 ACANA Heritage Free-Run Poultry.

YOUR DOG IS A CARNIVORE. DESIGNED BY NATURE TO THRIVE ON WHOLE GAME, FOWL OR FISH, AND POSSESSING A BIOLOGICAL NEED FOR FOODS THAT ARE RICH AND VARIED IN FRESH WHOLE ANIMAL INGREDIENTS.

ALL DOGS EVOLVED AS CARNIVORES — BIOLOGICALLY ADAPTED TO A DIET RICH IN MEAT AND PROTEIN. THAT’S WHY ACANA’S WILD MACKEREL SINGLES FORMULA IS LOADED WITH 50% WILD MACKEREL INGREDIENTS THAT NOURISH YOUR DOG ACCORDING TO HIS EVOLUTIONARY NEEDS WHILE LIMITING HIS EXPOSURE TO A SINGLE ANIMAL PROTEIN.

21. Other bags explain how Champion implements its “Biologically Appropriate” philosophy, explaining “Modern dogs are built like their ancestors. We believe they should eat like them too,” (*See, e.g., id. Ex. 8 at 6*, ’18 ORIJEN Six Fish), which is why Champion’s “Biologically Appropriate” dog food “mirrors the richness, freshness and variety of meats for which dogs are evolved to eat.” *See, e.g., Class Cert Mot. Ex. 2 at 2*, ’16-17 ACANA Regionals Meadowland.

MODERN DOGS ARE BUILT LIKE THEIR ANCESTORS.
WE BELIEVE THEY SHOULD EAT LIKE THEM TOO.



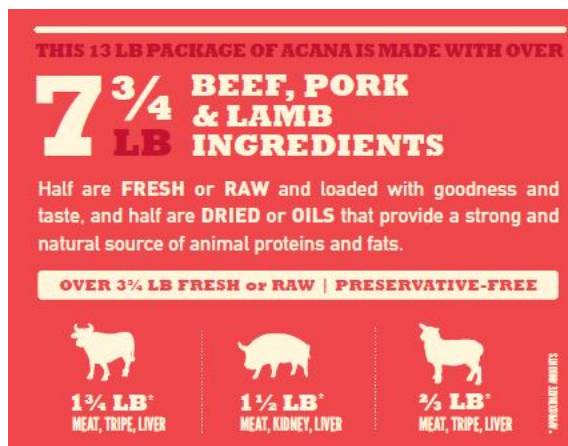
22. ORIEN is sometimes described as the “fullest expression of [Champion’s] Biologically Appropriate and Fresh Regional ingredients commitment.” *See, e.g., Mot. Ex. 9 at 2*, ’16-17 ORIEN Original.

23. As Champion’s former Chief Brand Officer testified, “[w]e follow what’s the most appropriate thing biologically. It’s not biologically perfect by the way, it’s biologically appropriate.” Muhlenfeld Dep. Vol. 1 at 120:7-10; 154:1-3 (“So biologically – the philosophy of biologically appropriate is to get as close to the natural diet as possible.”).

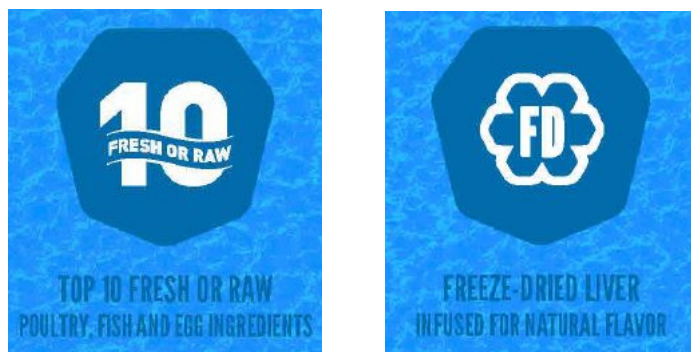
“Fresh” Statements on Champion’s Packaging Purchased by Plaintiff:

24. Although the statements on Champion’s packaging vary by diet and other factors, Champion’s diets purchased by Plaintiffs indicated that they contained, and did in fact contain, fresh ingredients, such as its chicken, turkey, pork, eggs, fruits and vegetable ingredients, among other ingredients in other forms, such as raw, dried, dehydrated, freeze-dried, or oils. Milam Dec. at ¶ 13; Class Cert Mot. at Ex. 1-11.

25. The front of the DogStar ’16-17 ACANA Heritage Red Meat package purchased by Chernik and Meyer states it is “infused with freeze-dried liver” and that “this 13 lb package of ACANA is made with over 7 ¾ lb of beef, pork, & lamb ingredients. Half are FRESH or RAW and loaded with goodness and taste, and half are DRIED or OILS that provide a strong and natural source of animal proteins and fats.” [Class Cert Mot. Ex. 3 at 2](#).



26. The front of the DogStar '16 ORIEN Six Fish package purchased by Chernik and Zarinebaf and the DogStar '16 ORIEN Original package purchased by Meyer contain icons that state “Top 10 [ingredients] fresh or raw” and “FD: freeze-dried liver.” [Class Cert. Mot. Ex. 8 at 2](#); [id. Ex. 9 at 2](#).



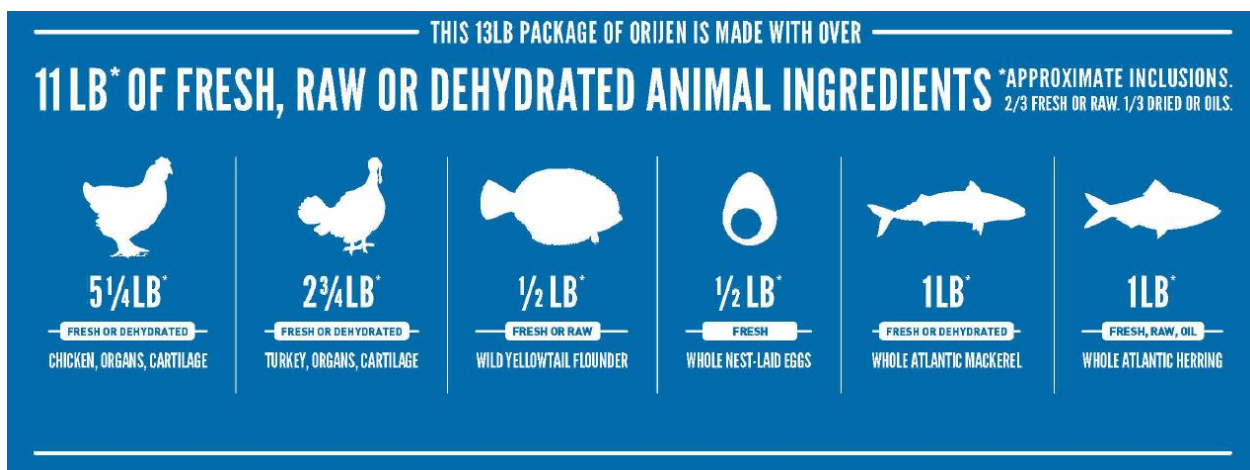
27. In fact, the front of every 2016-2017 and most 2018 DogStar packages purchased by Plaintiffs state that the diet includes “freeze-dried” ingredients. *See* Class Cert. Mot. Ex. 1-11, '16-18 ORIEN Original (“freeze-dried liver infused for natural flavor”), '16-18 ORIEN Six Fish (same), '16-18 ORIEN Senior (same), '16-18 ORIEN Regional Red (“freeze-dried tripe” and “freeze-dried liver”), '16-18 ACANA Regionals Meadowlands (“infused with freeze-dried chicken liver”), '16-18 ACANA Heritage Free-Run Poultry (same), '16-17 ACANA Heritage Red Meat (“infused with freeze-dried liver”), '16-18 ACANA Regionals Grasslands (“infused with

freeze-dried lamb liver”), ’16-17 ACANA Singles Lamb & Apple (same), ’16-17 ACANA Singles Wild Mackerel (“infused with freeze-dried mackerel”), and ’16-17 ACANA Singles Pork & Squash (“infused with freeze-dried pork liver”).

28. And, the front of many DogStar packages purchased by Plaintiffs state how many, and which, top ingredients were delivered either “**fresh or raw.**” *See, e.g.,* [Class Cert. Mot. Ex. 9 at 2](#), ’16-17 DogStar ORIJEN Original (“Top 10 fresh or raw poultry, fish, and egg ingredients”); *id.* [Ex. 8 at 2, 6](#), ’16-17 ORIJEN Six Fish (“Top 6 fresh or raw wild and sustainably caught fish”); *id.* [Ex. 4 at 2](#), ’16-17 ACANA Singles Lamb & Apple (“First ingredient from fresh or raw lamb”).

29. A panel on the back of each DogStar bag, referred to as “Meat Math,” breaks down the approximate amount, in pounds, of each key ingredient, and whether they were added fresh, raw, dried, freeze-dried, dehydrated, or as oils into the formula. Milam Dec. ¶¶ 15-16 (images).

30. For example, the Meat Math for ORIJEN Six Fish and Original state, in part, “this 13 lb package of ORIJEN is made with over 11 lb of fresh, raw or dehydrated fish [animal for Original] ingredients. 2/3 fresh or raw, 1/3 dried or oils.” [Class Cert. Mot. Ex. 8 at 3](#); *id.* [Ex. 9 at 3](#).



31. Each Plaintiff understood there were non-fresh ingredients in the food. Zarinebaf Dep. at 136:15-19 (testifying that he understood that an ACANA Lamb & Apple package contained ingredients that were “fresh, raw, dried, and oils.”); Chernik Dep. at 156:18-20, 182:21-25 (testifying that he “agree[d] that dried fish ingredients are not fresh fish ingredients,” “dried ingredients are not fresh ingredients,” and “oils are not fresh ingredients.”); Meyer Dep. at 83:20-84:9 (testifying that Champion’s saltwater fish would be “packed on ice” after caught because “[t]hat’s how we get our fish from all over the world unless we live by the ocean” and agreeing that after it is on ice, it will become frozen).

32. Champion never states 100%, each, every, or all ingredients are fresh, that its ingredients are “never frozen,” or that its dog food contains no frozen ingredients. Ogbonna Dec. ¶ 11; Deposition of Peter Muhlenfeld dated November 11, 2018 (“Muhlenfeld Dep. Vol. 2”), attached as “**Exhibit 12**,” at 197:7-25; Deposition of Jeff Johnston dated November 29, 2018 (“Johnston Dep.”), attached as “**Exhibit 13**,” at 49:18-19; Class Cert Mot. at Ex. 1-11.

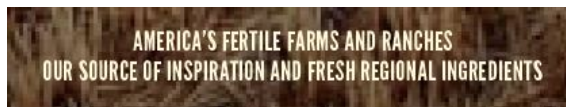
“Regional” Statements on Champion’s Packaging Purchased by Plaintiff:

33. Although the statements on Champion’s packaging vary by diet and other factors, Champion’s diets purchased by Plaintiff indicated that they contained, and in fact did contain, “regional” ingredients. Milam Dec. at ¶ 17; Class Cert Mot. at Ex. 1-11.

34. DogStar has sourced its chicken ingredients primarily from western Kentucky and processed in Paducah, Kentucky; turkey ingredients primarily from Mercer County, Ohio; lamb, mutton, and goat ingredients primarily from farms in Kentucky and Indiana, as well as ranches in New Zealand; beef ingredients primarily from Nebraska; pork ingredients primarily from Kentucky and Indiana; catfish and rainbow trout ingredients were caught wild in Kentucky and farmed in Idaho, respectively, and processed in Paducah, Kentucky; and egg ingredients from a

facility in Freeman, Kentucky, located about an hour and 15 minutes away from DogStar kitchen. Milam Dec. at ¶ 18.

35. The DogStar '16-17 ACANA Singles Pork & Squash, Regionals Meadowland, and Heritage Free-Run Poultry packages purchased by Plaintiffs respectively state that America's "fertile farms and ranches," "fertile farms and meadows," and "fertile farmlands" are Champion's "source of inspiration and fresh regional ingredients." Class Cert. Mot. [Ex. 1](#), [5](#), [6](#).



36. On the back of these packages, Champion explains "We focus on fresh ingredients from our region that are ranched, farmed or fished by people we know and trust." Class Cert. Mot. [Ex. 1](#), [5](#), [6](#).



37. The front of every ACANA bag also more specifically states the city or county, and state, province, or country where some key ingredients were sourced. Ogbonna Dec. at ¶ 13.

38. For example, the front of the DogStar '16-18 ACANA Meadowland package purchased by Meyer states: "Free-Run Chicken: Mayfield, Kentucky; Free-Run Turkey: Mercer County, Ohio; Freshwater Catfish: Paducah, Kentucky; Rainbow Trout: Soda Springs, Idaho." [Class Cert. Mot. Ex. 6 at 2, 3](#). And, the front of the DogStar '16-17 ACANA Wild Mackerel states: "Wild Mackerel: New Bedford, Massachusetts." [Class Cert Mot. Ex. 7 at 2](#).



39. And, the back of the DogStar '16-17 ACANA Lamb & Apple bag purchased by all three Plaintiffs states, “Grass-fed on Kentucky and New Zealand ranches, our fresh or raw lamb arrives in WholePrey ratios.” [Class Cert. Mot. Ex. 4 at 3](#).

Grass-fed on Kentucky and New Zealand ranches, our fresh or raw lamb arrives in WholePrey™ ratios — a richly nourishing balance of meat, organs and cartilage that mirrors the natural diet, virtually eliminating the need for synthetic additives in our foods. Generous infusions of freeze-dried lamb liver make ACANA a perfect choice for fussy eaters.

40. ORIEN bags also provide regional descriptors, for example, ORIEN Six Fish explains the fish is from “New England’s vast Atlantic waters” and a supplier of the fish is in New England. [Class Cert. Mot. Ex. 8](#).



41. The DogStar ORIEN Original package purchased by Meyer states it contains ingredients that were “sustainably farmed or fished in our region” and the DogStar ORIEN Regional Red diet purchase by Chernik and Zarinebaf states “America’s vast and fertile lands – our source of inspiration and fresh regional ingredients.” Class Cert. Mot. [Ex. 9 at 3, 6](#); [Ex. 10 at 2, 6](#).

42. It is undisputed that Champion never states on any of its packaging that 100%, each, every or all ingredients are regional. Ogbonna Dec. ¶ 12; Muhlenfeld Dep. Vol. 2 at 197:7-25; Johnston Dep. at 49:18-19; Class Cert Mot. at Ex. 1-11.

Other Statements on Champion’s Packaging Purchased by Plaintiffs:

43. The phrase “Delivering Nutrients Naturally” appears on the back of some DogStar ACANA packages in a variety of contexts. *See, e.g.*, Class Cert. Mot. Ex. 1-7.

44. On some ACANA packages it states, in full: “Mirroring nature, ACANA WholePrey foods feature a nourishing balance of poultry, organs and cartilage — all of which reflect the whole prey animal, delivering nutrients naturally. That’s why you won’t find long lists of synthetic additives in ACANA foods.” *See, e.g.*, Class Cert. Mot. [Ex. 5 at 2](#), [Ex. 6 at 2](#).

Mirroring Mother Nature, ACANA WholePrey™ foods feature a nourishing balance of poultry, organs and cartilage plus whole eggs — all of which reflect the whole prey animal, DELIVERING NUTRIENTS NATURALLY.

That’s why you won’t find long lists of synthetic additives in ACANA foods.

45. On other ACANA packages it states, “ACANA features WholePrey ratios of poultry, organs and cartilage which deliver nutrients naturally,” (*see, e.g.*, [Class Cert. Mot. Ex. 1 at 3](#)), and on others: “WholePrey ratios of meat, organs and cartilage deliver nutrients naturally, without the long list of synthetic additives.” *See, e.g., id.* [Ex. 4 at 4](#), [Ex. 5 at 3](#).

ACANA features WholePrey ratios of poultry, organs and cartilage which deliver nutrients naturally.

WholePrey ratios of meat, organs and cartilage deliver nutrients naturally, without the long list of synthetic additives.

46. The front of ’16-17 ACANA packages state that the formulas include “zinc proteinate – our one and only supplement,” which is, in fact, the only synthetic ingredient used in these formulas, as reflected in the ingredient panels (*see* [Class Cert. Mot. Ex. 1 at 2](#), [Ex. 2 at 2](#), [Ex. 3 at 2](#), [Ex. 4 at 2](#), [Ex. 5 at 2](#), [Ex. 6 at 2](#)) and the ingredient panels on subsequent bags of ACANA list all supplements or synthetics used by Champion and reveal that Champion did not use a “long

list of synthetic additives.” *Id.*

PLUS ZINC PROTEINATE - OUR ONE AND ONLY SUPPLEMENT

47. The nutrients provided to dogs from the consumption of Champion’s ACANA dog food come from natural ingredients rather than synthetic ingredients (with the exception of zinc proteinate in 2016-2017 ACANA diets). Johnston Dec. ¶¶ 7-9.

48. Champion does not represent that all or 100% of its ingredients are natural, that its food is “all natural,” “100% natural,” or made of “only natural ingredients,” or anything of the sort. Johnston Dec. ¶ 11; Ogbonna Dec. ¶ 14.

49. The back of every Champion package has an ingredient panel that lists all ingredients in order of weight, which each Plaintiff testified they read. Ogbonna Dec ¶ 24; Zarinebaf Dep. 96:2-4, 96:11-14, 109:14-16, 139:20-23; Chernik Dep 126:11-14, 126:22-127:3. However, Meyer only read the first few ingredients on NorthStar bags and did not read the ingredients on DogStar bags. Meyer Dep. at 66:21-67:9; 72:25-73:4; 82:6-11; 90:5-8.

50. The image in the Paragraph 10 of the Second Amended Complaint ([ECF No. 26](#)) is from a brochure that was only circulated to distributors and retailers and was generally not circulated to the public at-large. Ogbonna Dec. ¶ 17.

51. Plaintiffs testified that they did not read or rely on that particular Acana brochure. Chernik Dep. 111:24-113:14. Meyer Dep. 32:23-25; Zarinebaf Dep. 41:4-6.

52. The “excluding...anything else nature didn’t intend your dog to eat” language from the brochure seen in Paragraph 10 of the First Amended Complaint does not appear on any packages of the diets Plaintiff purchased. Ogbonna Dec. ¶ 18; Class Cert. Mot. Ex. 1-11.

The Levels of Heavy Metals in Champion Dog Food are Not Unsafe:

53. Nearly all foods, whether for humans or pets, contain some levels of heavy metals,

such as arsenic, cadmium, lead, and mercury, including the dog foods Plaintiffs purchased after discontinuing Champion. Poppenga Report at 8, 9-21, 40 (Conclusion A); Expert Rebuttal Report of Dr. Robert H. Poppenga (“Poppenga Rebuttal Report”), attached as “**Exhibit 14**,” at 9-10.

54. Arsenic, cadmium, lead, and mercury are naturally occurring elements that are ubiquitous in the environment and commonly found in dog foods and in the ingredients used to make Champion’s food. Poppenga Report at 4-7, 9-21, 40 (Conclusion A); Poppenga Rebuttal Report at 9-10; Expert Report of Dr. Gary Pusillo titled “Test Results of Champion Petfoods USA, Inc. and Champion Petfoods LP for Heavy Metals and Plasticizers” (“[Pusillo Test Report](#)”), [[ECF No. 108-3](#)] at 33-35.

55. Champion does not add heavy metals as ingredients into its foods. Johnston Dec. ¶ 12.

56. Champion does not advertise that its diets contain no heavy metals or are “heavy metal-free.” Ogbonna Dec. at ¶ 16; Class Cert Mot. Ex. 1-11.

57. In 2005, the National Research Council (“NRC”) published a study in the Mineral Tolerance Animals, 2nd Revised Edition, 2005, that provided maximum tolerable limits (“MTLs”) for arsenic, cadmium, lead, and mercury in dog foods. Poppenga Report at 22.

58. In 2011, the FDA conducted its own review as to the levels of heavy metals in pet food, entitled the Target Animal Safety Review, and by way of this report, approved of and uses the following NRC MTLs to help guide regulatory decisions: (1) Arsenic 12,500 µg/kg (12.5 mg/kg); (2) Cadmium 10,000 µg/kg (10 mg/kg); (3) Lead 10,000 µg/kg (10 mg/kg); and (4) Mercury 267 µg/kg (.27 mg/kg). Poppenga Report at 22-23.

59. In 2002, the European Union (“EU”) had enacted regulations for the safe upper limits of arsenic (10 mg/kg), cadmium (2 mg/kg), mercury (.3 mg/kg), and lead (5 mg/kg) in pet

foods. Poppenga Report at 23-24.

60. The levels of heavy metals in Champion's dog food are well below the MTLs set by the NRC/FDA and the EU safety standards for heavy metals in pet food. Poppenga Report at 12-14, 25-28, 41 (Conclusion E).

61. Eurofins' testing at the request of Champion during the ordinary course of its business establishes that the levels of heavy metals in Champion's dog food are well below the MTLs set by the NRC/FDA and the EU safety standards for heavy metals in pet food. Poppenga Report at 28, 41 (Conclusion E).

62. Testing performed for Plaintiff by Iowa State University Veterinary Diagnostic Lab and Ellipse Analytics establish that the levels of heavy metals in Champion's dog food are well below the MTLs set by the NRC/FDA and the EU safety standards for heavy metals in pet food. Poppenga Report at 27; [Pusillo Test Report](#) at 24, 26.

63. Taking the highest level of each heavy metal in each of the at-issue diets, as set forth in the TAC (DogStar ORIEN Six Fish: 3169.80 ug/kg⁴ of arsenic (25.36% of MTL); DogStar ORIEN Six Fish 200.50 ug/kg of cadmium (20.05% of MTL); DogStar ORIEN Six Fish 54.90 ug/kg of mercury (20.56% of MTL); ACANA Heritage Red Meats 1731.90 ug/kg of lead (17.32% of MTL)), these levels are still a fraction of any known MTL for heavy metals in dog food and are well below the EU standards. [TAC Ex. 2](#); Poppenga Report at 27.

64. At Champion's request, Eurofins tested 65 samples of competitor dog foods (including samples of diets Plaintiffs purchased after discontinuing to purchase Champion dog food) for arsenic, cadmium, lead, and mercury, and found each sample had metals present at safe levels. Poppenga Report at 15-20.

⁴ 1 ppb (part per billion) is equivalent to 1 ug/kg (microgram per kilogram), and 1 ppm (part per million) is equivalent to 1 mg/kg (milligram per kilogram) or 1,000 ppb.

65. Ellipse Analytics tested hundreds of dog foods and found heavy metals in almost all of them. Deposition of Sean Callan dated May 9, 2019 (“Callan Dep. Vol. 1”), attached as “**Exhibit 15**,” at 53:12-16; 54:16-55:3.

66. The levels of naturally occurring heavy metals in ACANA and ORIJEN dog food diets do not present a health risk to dogs. Poppenga Report at 40-41 (Conclusion D).

67. Plaintiff’s expert Dr. Gary Pusillo did not identify any known safety standard or guidelines applicable to canines or to dog food that Champion’s dog food exceeds. Deposition of Dr. Gary Pusillo dated April 26, 2019 (“Pusillo Dep. Vol. 1”), attached as “**Exhibit 16**,” at 11:21-12:22; 13:21-14:12; 31:4-8; Deposition of Dr. Gary Pusillo dated May 31, 2019 (“Pusillo Dep. Vol. 2”), attached as “**Exhibit 17**,” at 86:8-17; 93:5-18; 94:4-12.

68. Plaintiff’s expert Dr. Pusillo is not a pet food safety expert or a toxicologist. Pusillo Dep. Vol. 1 at 36:23-37:5; 130:6-14; 143:22-24; Pusillo Dep. Vol. 2 at 67:21-23.

69. Plaintiffs in this case testified that they knew heavy metals are naturally found in Champion’s ingredients. Meyer Dep. at 14:11-15:15 (testifying she was aware for the last ten years that heavy metals are naturally occurring in animals and plants, including that apples contained arsenic and fish contained mercury); Zarinebaf Dep. at 147:3-11 (when asked about his awareness of heavy metals, Zarinebaf testified “they’re everywhere,” and acknowledged seafood contains mercury and rice contains arsenic); Chernik Dep. at 149:19-24; 224:5 (testified he had “heard of the concept of naturally occurring heavy metals” and understood it to mean “that some heavy metals [] are on this earth that are not manmade,” and testifying that “some fish can have mercury.”).

The Levels of BPA Found in Champion’s Dog Food Would Not Harm a Dog:

70. Bisphenol-A (BPA) is a chemical molecule that is produced for use primarily in the

production of polycarbonate plastics and epoxy resins, which frequently appear in water bottles, infant bottles, CDs, medical devices, and lacquers to coat products such as food cans and bottle tops. Poppenga Report at 29.

71. Humans and animals are most commonly exposed to BPA through their diet, as BPA tends to leach into food and liquid. Poppenga Report at 29.

72. Because of humankind's extensive use of plastics, BPA is also prevalent in the environment, and many studies have measured levels of BPA in our air, dust, and water, showing humans and animals are exposed to BPA daily through a variety of pathways. Poppenga Report at 29.

73. Champion does not add BPA as an ingredient in its dog foods. Johnston Dec. at ¶ 13.

74. Champion does not advertise its food as "BPA Free," or words to that effect. Ogbonna Dec. at ¶ 15; Class Cert. Mot. Ex. 1-11.

75. Table 5 of Plaintiffs' expert report of Dr. Pusillo contains BPA "testing results as alleged in the complaint," conducted by Plaintiffs' lab, Ellipse Analytics, which shows levels of BPA present in some of the diets that Plaintiffs' purchased. [Pusillo Test Report](#) at 26.

76. The BPA levels reported by Ellipse Analytics range (for the at-issue diets) from "ND," non-detectable, for ACANA Grasslands purchased by Chernik and Zarinebaf and ORIJEN Original purchased by Meyer, to 82.7 ppb for ACANA Regionals Meadowland purchased by Meyer. [Pusillo Test Report](#) at 26.

77. Plaintiffs' lab, Ellipse Analytics, utilized a 30 ppb Level of Quantification ("LOQ") testing criteria to obtain these results, and the test results for several hundred dog foods, and found that approximately one-third of dog foods had BPA in them. Callan Dep. Vol. 1 at 53:12-16; 54:10-

15; 55:4-8.

78. If Plaintiffs' lab had used a more sensitive LOQ, it would have found BPA in even more of the dog foods it tested. Callan Dep. Vol. 1 at 59:2-16.

79. Another laboratory, ExperTox, utilized by Plaintiffs to test Champion's dog food diets for BPA, did not detect any BPA in any of the 38 samples of Champion's dog food it tested, which included diets purchased by Plaintiffs. Pusillo Dep. Vol. 1. at 19:15-17; 21:11-18; 43:2-5; 124:9-13; Pusillo Dep. Vol. 2. at 111:16-112:1.

80. At Champion's request, Eurofins laboratory tested samples of the diets Plaintiffs purchased for BPA, utilizing a highly-sensitive 5 ppb LOQ for BPA. Poppenga Report at 31-32.

81. Eurofins testing done on samples of the diets Plaintiffs purchased (with the exception of ACANA Meadowlands, Grasslands, and Free-Run Poultry), resulted in a non-detect reading because the levels of BPA (if any) were below the 5 ppb LOQ. Poppenga Report at 31-32.

82. The results for ACANA Meadowlands, Grasslands, and Free-Run Poultry were 5.90, 5.43, and 5.30, respectively (but would read as a "zero" under Plaintiffs' criteria). Poppenga Report at 31-32.

83. Additionally, Eurofins' testing of competitor dog foods demonstrated that BPA was also found in numerous competitor brands at various low levels. Poppenga Report at 32.

84. The levels of BPA purportedly in Champion's dog food according to Plaintiffs would not cause an adverse health effect in a dog. Poppenga Report at 33, 41 (Conclusion H).

85. Plaintiffs have put forth no expert who opines that the BPA levels detected would be harmful to a dog. Pusillo Dep. Vol. 1. at 26:12-16; 108:22-109:1; Pusillo Dep. Vol. 2. at 112:5-13; Callan Dep. Vol. 1. at 84:17-85:18.

86. Plaintiffs' expert, Dr. Pusillo, is not a BPA expert and gave no opinion on the source of BPA (*i.e.* how it could have come to be present) in Champion's dog food. Pusillo Dep. Vol. 1 at 15:11-16; 15:22-25; Pusillo Dep. Vol. 2 at 112:5-13.

Very Low and Non-Dangerous Levels of Pentobarbital were Found in an Ingredient Supplied to Champion's DogStar Kitchen in Late March 2018 for its "Red" Diets, but Not Found in its Finished Dog Food:

87. Champion uses beef tallow (a/k/a fat) as an ingredient for its beef-based dog food diets⁵ and spray it on the kibble at the end of the production run primarily for palatability. Milam Dec. ¶¶ 19, 22.

88. Beef tallow is created through a process called "rendering," during which the supplier, a rendering facility, converts fat from a healthy slaughtered cow in part into beef meal and in part into beef tallow. Milam Dec. ¶ 21.

89. Champion's ingredient specifications to its suppliers require that all beef tallow sold to Champion be rendered from "EU Category 3" standard cows, meaning "no dead, dying, or condemned" animals are allowed. Deposition of Kenneth Gilmurray ("Gilmurray Dep."), attached as "**Exhibit 18**," at 180:14-19, 181:1-11, 186:25-189:8, 247:6-248:12, Ex. 18 ("EU certified, category 3. Product shall not contain animals dead or condemned upon reaching the slaughter facility. Product shall be from animals deemed fit for human consumption, and consist of meat, organ and bone."), Ex. 19 (same).

90. From around August 2016 to May 2018, Champion's DogStar Kitchen purchased beef tallow from several suppliers, one of them being JBS, but discontinued purchasing beef tallow from JBS in May 2018. Milam Dec. at ¶¶ 23, 24; Gilmurray Dep. at 226:14-16.

⁵ Champion's beef-based diets are branded as the "Red" diets, which consist of ORIJEN Regional Red, ACANA Heritage Red Meat, as well as ACANA Heritage Appalachian Ranch and ACANA Singles Beef & Pumpkin (which are not at-issue in this case). Milam Dec. ¶ 20; See [ECF No. 102](#); [ECF No. 95](#) at 15-16.

91. On or around May 7, 2018, Champion learned that the Pennsylvania Department of Agriculture had inspected JBS' MOPAC rendering plant in Pennsylvania and took samples of its beef tallow to determine if it contained pentobarbital. Gilmurray Dep. at 42:8-43:4, Ex. 21.

92. The Pennsylvania Department of Agriculture determined that two lots of beef tallow delivered to Champion by JBS on or around March 26, 2018 and March 28, 2018 had tested positive for small amounts of pentobarbital (at 56 ppb and 16 ppb, respectively). Gilmurray Dep. 218:2-10, Ex. 21.

93. Pentobarbital is not added as an ingredient in Champion's dog food. Johnston Dec. ¶ 14; Milam Dec. ¶ 28.

94. Zarinebaf's produced receipts indicate he purchased ORIJEN Regional Red on March 7, 2015, and Meyer's produced receipts indicate she purchased ACANA Heritage Red Meats on November 22, 2016. Zarinebaf Dep. Ex. 3 at 5, Meyer Dep. Ex. 3 at 9.

95. After receiving the May 7, 2018 letter from the Pennsylvania Department of Agriculture, Champion immediately analyzed which of its production runs (also called "lots") were made with the affected beef tallow and quarantined all unshipped kibble made with it, as well as unused tallow it had received from JBS. Deposition of Jim Wagner dated April 3, 2019 ("Wagner Dep."), attached as "**Exhibit 19**," at 47:22-24, 133:9-12.

96. Champion pulled back from its distributors all of the unsold food it had that was made with the affected beef tallow. Wagner Dep. 131:14-18.

97. Of the 1.7 million pounds of dog food manufactured using the affected beef tallow, Champion quarantined or retrieved from its distributors approximately 1.6 million pounds; only about 100,000 pounds of kibble were sold into retail nationwide. Wagner Dep. 46:11-14, 129:10-25, 131:14-18.

98. It is not known if any of 100,000 pounds of kibble made with the affected JBS beef tallow was ever sold in Illinois. Deposition of Erik Flakstad dated December 7, 2018, attached as “**Exhibit 20**,” at 72:20-21; 80:9-15; 113:16-114:9.

99. Champion retained a consultant to assess whether the consumption of dog food from the affected lots would pose a health risk to dogs. Declaration of Gayan Hettiarachchi, (“Hettiarachchi Dec.”), attached as “**Exhibit 21**,” at ¶ 18, Ex. A.

100. Due to the low amount of pentobarbital in the affected tallow, as well as the fact that tallow is only a small fraction of the finished food, the consultant determined, using the FDA’s No Observable Effect Level (NOEL), that the small amount of pentobarbital in the beef tallow used in the affected lots would not pose any danger to any dog. Hettiarachchi Dec. ¶ 18, Ex. A.

101. Champion determined that it had run only 6 production runs, comprised of 11 production shifts, with the affected beef tallow, and was able to take 11 individual properly mixed and homogenized composite 18-ounce samples, which were representative of the 11 production shifts. Hettiarachchi Dec. ¶ 16; Wagner Dep. at 48:21-50:9.

102. Champion submitted these 11 composite samples of the quarantined dry finished kibble made with the affected tallow lots to Texas A&M Veterinary Medical Diagnostic Laboratory (“TVMDL”) for testing. Hettiarachchi Dec. ¶ 15; Wagner Dep. at 152:11-17.

103. All eleven (11) composite samples tested by TVMDL resulted in a “Non-Detect” reading with a 2 ppb LOD (level of detection). *See* TVMDL Test Results, CPF2118823-24, attached as “**Exhibit 22**”; Wagner Dep. at 152:11-153:9.

104. Plaintiffs’ expert has no critique of the TVMDL testing of the 11 composite samples or of TVMDL’s results. Deposition of Sean Callan dated August 20, 2019 (“Callan Dep. Vol. 2”), attached as “**Exhibit 23**,” at 29:8-16.

105. FDA's guidance states that it is pentobarbital's "**detection** [that] renders the product adulterated," See FDA, *Questions and Answers: Evanger's Dog and Cat Food* (webpage archived on Feb. 7, 2019 at 19:57) <https://wayback.archive-it.org/7993/20190207195700/https://www.fda.gov/AnimalVeterinary/NewsEvents/ucm544348.htm> (last accessed August 14, 2019), attached as "**Exhibit 24**."

106. Plaintiffs' experts agreed that it is pentobarbital's detection that renders a product adulterated. Callan Dep. Vol. 2 at 103:18-104:21 (testifying "[y]es, that is my understanding" when asked "to be adulterated, it [meaning pentobarbital] has to be detected, correct?"); Deposition of Gary Pusillo dated September 12, 2019 ("Pusillo Dep. Vol. 3"), attached as "**Exhibit 25**" at 20:7-16.

107. The FDA inspected Champion's DogStar Kitchen on May 16th, 17th, and 23rd of 2018, reviewed the TVMDL test results and (i) approved of Champion's handling of the situation, including Champion's decision not to recall product from retailers, (ii) determined no other action was needed, and (iii) issued a No-Action letter. Wagner Dep. 33:5-34:12, 53:20-54:12, 84:14-23, Ex. 4.

108. Based on (i) TVMDL "Non-Detect" test results on the composite samples of the kibble, (ii) the opinion of a private consultant, and (iii) the FDA's approval, Champion determined that consumption of the kibble posed no danger to dogs and it was unnecessary to recall the affected food from retailers because the finished dog food posed no danger to dogs. Wagner Dep. at 33:24-34:2, 47:10-24, 48:12-17, 52:20-24, 53:20-54:5, 84:14-23, 98:10-20, 152:11-153:9; Hettiarachchi Dec. ¶ 18, Ex. A.

109. Plaintiffs have no testing or evidence showing that any other beef tallow shipment from JBS contained pentobarbital, or any Champion dog food contained detectable amounts of

pentobarbital. Callan Dep. Vol. 2 at 53:18-24 (Plaintiffs' expert admitting "I don't have data" when asked to support an opinion as to whether any other tallow shipments received by Champion were positive for pentobarbital); 65:12-66:11 (admitting neither he, nor anyone at his lab, has ever tested any Champion dog food for pentobarbital); 97:2-17 (admitting he was unaware that Plaintiffs' counsel requested a sample of Champion's products made with the affected beef tallow, and no testing was done on the sample).

Dated: June 8, 2021

s/ David A. Coulson

David A. Coulson (ARDC #6199911)

Jessica J. Fishfeld (ARDC #6313149)

Jared R. Kessler (*pro hac vice*)

Robert S. Galbo (*pro hac vice*)

Elisa H. Baca (*pro hac vice*)

GREENBERG TRAURIG P.A.

333 S.E. 2nd Avenue, Suite 4400

Miami, FL 33131

Tel: (305) 579-0754

Email: coulsond@gtlaw.com

johnsonj@gtlaw.com

kesslerj@gtlaw.com

galbor@gtlaw.com

bacae@gtlaw.com

Francis A. Citera (ARDC # 6185263)

GREENBERG TRAURIG LLP

77 West Wacker Drive, Suite 3100

Chicago, IL 60601

Tel: (312) 456-8400

Email: citeraf@gtlaw.com

Rick L. Shackelford, Esq. (*pro hac vice*)

GREENBERG TRAURIG LLP

1840 Century Park East, Suite 1900

Los Angeles, CA 90067

Tel: (310) 586-3878

Email: shackelfordr@gtlaw.com

Attorneys for Defendants

Champion Petfoods USA Inc. and

Champion Petfoods LP